

OREGON NATURAL RESOURCES COUNCIL

IBLA 95-99

Decided December 10, 1997

Appeal from a Decision of the Acting Deschutes Area Manager, Prineville (Oregon) District Office, Bureau of Land Management, approving amendment of access road right-of-way OR-48730. EA-OR-056-4-109.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Federal Land Policy and Management Act of 1976--Rules of Practice: Appeals: Burden of Proof

A BLM decision amending a road right-of-way to authorize two additional landowners to utilize existing roads across public land to access their private property will be affirmed where the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest, and no reason for disturbing the decision is shown on appeal. An appellant has the burden of showing error in the challenged decision and supporting its allegations with evidence demonstrating error. Conclusory allegations of error or differences of opinion, standing alone, do not suffice.

APPEARANCES: Candace Guth, Oregon Natural Resources Council, Portland, Oregon, for the Oregon Natural Resources Council.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Oregon Natural Resources Council (Council) has appealed from the September 16, 1994, Decision of the Acting Deschutes Area Manager, Prineville (Oregon) District Office, Bureau of Land Management (BLM or Bureau), approving the amendment of right-of-way OR-48730 to authorize Glen Schnetzky (Schnetzky), Marion Kingham, Sr., and Marion Kingham, Jr. (the Kinghams), as well as the original grant holders Jaiaen Beck and Clarence Pare (Beck/Pare), to use existing roads to access their private property, based on Environmental Assessment (EA) No. OR-056-4-109 and the Finding of No Significant Impact (FONSI) issued by the Area Manager on July 8, 1994.

The Bureau originally granted right-of-way OR-48730 to Beck/Pare in July 1993, allowing use of an existing road from Paulina Highway (State Highway 380) through public lands in secs. 11, 14, and 15, T. 16 S., R. 17 E., Willamette Meridian, Crook County, Oregon. 1/

On September 14, 1993, pursuant to section 501(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761(a) (1994), Schnetzky filed an application for a right-of-way over an existing BLM road located in the SE¼ sec. 11 and the NW¼NE¼ and NW¼ sec. 14, T. 16 S., R. 17 E., Willamette Meridian, to provide ingress and egress from Paulina Highway to his 50 acres of private land. Schnetzky planned to maintain the road himself and keep it passable in all seasons, limiting the upkeep to grading where necessary and placing gravel in the steep areas. He identified an alternative route to his property crossing private property for which he had no easements, but stated that the longer alternative route would require maintenance of more road and that easements from the several private landowners would be more costly to obtain.

On December 1, 1993, BLM finalized a Decision implementing the Coordinated Resource Management Plan (CRMP) for the Upper Prineville Reservoir area which effectuated a seasonal closure from December 1 through March 31 for an area including the lands embraced by right-of-way OR-48730, in order to protect wildlife, watershed, and other resource values. 2/ Schnetzky's requested use of a road in the seasonal closure area necessitated development of an EA addressing the impacts of granting him a right-of-way.

On May 23, 1994, the Kinghams filed an application for a right-of-way to use and maintain an existing road on the north side of O'Neil Creek, including the approach to Paulina Highway, from the highway to the east line of the W¼W¼ sec. 11, T. 16 S., R. 17 E., Willamette Meridian. The Kinghams sought the right-of-way to provide legal access to their private residence and proposed to maintain the road by blading and applying gravel as needed. The route requested by the Kinghams does not fall within the area subject to seasonal winter closure. See Undated draft letter at 1.

Although EA No. OR-056-4-109 referenced both Schnetzky's and the Kinghams' access road requests, it focused on the former and the consequent BLM actions. The EA acknowledged that Schnetzky's proposed right-of-way traversed an area subject to the seasonal winter closure to protect

1/ The case file does not contain a copy of the original right-of-way, but BLM refers to the grant in the EA. According to an undated draft letter in the case file, Beck/Pare's access needs were limited to the summer months only.

2/ Although the case file does not contain a copy of the BLM implementation decision, there is no dispute that part of the public lands included in the amended right-of-way are subject to the seasonal closure. See EA at 2.

wildlife values associated with a deer winter range and that spur roads intersecting the route had been designated for closure and restoration. However, the EA also cited BLM policy and manual guidance providing that access for the reasonable use and enjoyment of private lands surrounded by public lands could not be denied. (EA at 2.)

In describing the proposed 6,864-foot long and 30-foot wide right-of-way, the EA indicated that the existing unimproved road, which spanned a 500-foot elevation difference with two steep segments, had degraded from use during wet seasonal periods and had eroded in areas to well below natural ground level. The EA stated that Schnetzky proposed to upgrade the road himself to the delineated minimum standard to facilitate access on a year-round basis. The EA also detailed BLM's plans to purchase and install a culvert in O'Neil Creek from the permitted approach road on the north side of the creek and to extend the road south of the creek crossing to intersect with the existing southside road, noting that the segment of the existing road extending from the highway to the intersection would be restored by ripping, disking, and reseeded. Seasonal access restrictions to the area would be regulated at the existing north approach to Paulina Highway, the EA observed, by placing a gate at the existing cattleguard which would be locked during the prescribed seasonal closure, with access privileges limited to the right-of-way users, who would be responsible to maintain the locked gate during the closure, and other authorized personnel. Id. at 2-4.

The EA identified one alternative access route to the west which crossed about 4 miles of private lands within four separate tax lots before reaching the Juniper Canyon County Road. According to the EA, this road was unimproved (running through areas with extended periods of wet, snow packed, and muddy conditions) and included a narrow segment with a northern exposure and a steep drop off the side of the road to the bottom of a drainage, which could be dangerous during winter driving conditions. The EA further noted that the existing approach to the county road was below grade, situated on a curve, and considered unsafe, such that it would have to be relocated and redesigned before the county would issue an approach permit. The alternative crossed five drainages with intermittent flow, traversed predominantly clay soil slippery when wet, and would be very expensive to upgrade and maintain. Accordingly, since the alternative was longer and more difficult to maintain, the EA determined that it was less feasible than the proposed route and did not further evaluate it. Id. at 4.

The EA recognized that road use and periodic maintenance would cause surface disturbance impacts and that continued public use of the roads in the area during winter months would lead to adverse environmental impacts.

However, it determined that improving and upgrading the road would stabilize a degrading and eroding roadway and that cumulative use of the improved roadway by only the right-of-way holders was not expected to conflict with the intent of the seasonal road closures in the area. Id. at 6. The EA found that restricting public use of the proposed access road

through the area subject to the seasonal closure would minimize conflicts with resource values. Mitigation measures were accordingly proposed to achieve this result, including establishing a locked gate near the creek crossing to control traffic into the area and eliminate indiscriminate motor vehicle use by the public in the protected area. The EA further observed that improving the surface and drainage along the right-of-way would reduce erosion and sedimentation and protect watershed values. Id. at 7. It also enumerated special stipulations containing additional measures designed to safeguard the seasonal closure and protect other resource values. Id. at 8-9. Finally, it recommended that right-of-way OR-48730 be amended to include rights to Schnetzky and the Kinghams for personal use access along an existing road to their private property. Id. at 9.

The EA and the concomitant July 8, 1994, FONSI were circulated for public comment. The Council responded, objecting to the proposed action on the grounds that Schnetzky had other access to his private property, that the road would traverse prime winter wildlife range and allow access to spur roads, and that BLM's improvements would cause additional wildlife problems. The Oregon Department of Fish and Wildlife (ODFW) also commented on the proposal, addressing concerns about the action's effects on wintering deer. The ODFW recommended various measures to reduce those impacts to a satisfactory level, including allowing only personal residential use between December 1 and March 31 (when wintering deer densities were the greatest); utilizing a sturdy, lockable gate at the access point; implementing a combination of permanent and seasonal road closures as identified in the CRMP process, such as road obliteration, physical closures, or gates; and monitoring and enforcing the access restrictions.

In its September 16, 1994, Decision, BLM adopted the EA's recommendations and approved amendment of right-of-way OR-48730 to allow Schnetzky and the Kinghams to use an existing road for personal access for residential purposes to their private property. Both Schnetzky's grant of a 6,864-foot long, 30-foot wide right-of-way segment and the Kinghams' authorization for a 4,000-foot long, 30-foot wide right-of-way segment included use of the approach road to Paulina Highway on the north side of O'Neil Creek. The grant was subject to the seasonal road closure (from December 1 to March 31 annually) for the general public in accordance with the provisions of the CRMP. See Ex. B at Stipulation 9.

In its September 16, 1994, Decision Record, BLM explained that approving the right-of-way requests would consolidate the property owners' legal access rights through public lands to their private property and would deter resource degradation by regulating use and improving the condition of the existing road. The alternative route to the Schnetzky acreage not only was unsafe and less feasible than the proposed route, but, BLM added, would create additional environmental consequences due to creek crossings, culvert installations, and road improvement and maintenance. The Decision found that revamping the crossing at O'Neil Creek and installing a locked gate would facilitate effective management of crucial deer winter range and seasonal closures and that improving the degrading road to prevent erosion

and enhance watershed conditions conformed to the intent of the CRMP. The Decision Record indicated that BLM's policy of providing access to private inholdings surrounded by public lands served the needs of the public and noted that BLM had placed the access grants along the most feasible routes and had imposed mitigation measures as stipulations in the grants. The Decision Record also noted that BLM would install a 36-inch culvert in O'Neil Creek to facilitate a crossing for this roadway.

The Decision imposed various terms, conditions, and stipulations, several of which concerned the seasonal closure and protection of the wintering deer populations. As noted above, these measures included closing the road to motor vehicle use by the general public between December 1 and March 31 of each year; performing only essential maintenance activities during the winter closure season; restricting use of the designated road for residential purposes during the seasonal closure; and locking and maintaining the gate at the access point during the seasonal winter closure period.

On appeal, the Council contends that BLM's Decision conflicts with the Upper Prineville Reservoir CRMP's seasonal road closure, the National Environmental Policy Act of 1969, as amended, 42 U.S.C. §§ 4331-4361 (1994), and FLPMA. The Council claims that approval of year-round road access contravenes the intentions of the CRMP and evades Departmental guidelines for coordinating actions with other agencies to provide for common goals. The Council asserts that the planning process for the Upper Prineville Reservoir (begun by the Bureau of Reclamation in 1987) studied serious big game winter range problems, water resource protection, and road usage and closures. The Council submits that it would be terrible precedent for BLM to violate a plan finalized in late 1993 and developed through agency cooperation and public input within its 10-year effective period, especially since the land owner requesting use of the access road has other access to his land and knew when he purchased his property that the road was proposed for seasonal closure.

The Council argues that BLM's Decision clashes with FLPMA's direction that public lands be managed in accordance with comprehensive land-use plans reflecting the principles of multiple use and sustained yield. According to the Council, ODFW prefers that all winter use be prohibited in the critical big game winter habitat traversed by the road. The Council contends that BLM has ignored the problems documented by ODFW concerning violations of other seasonal closures and the severe consequences to wintering game caused by these violations. The Council asserts that BLM has disregarded ODFW's opinion that the planned road improvements (including the culvert in O'Neil Creek) will also likely have similar negative impacts on big game in the area and has failed to require the applicant to demonstrate his ability to successfully improve the road to minimize erosion and washout. The Council claims that ODFW believes that year-round access to the landowners will likely cause severe negative impacts to big game. It submits that the public's interest in the big game critical winter habitat

far exceeds the interests of the three property owners who would still have access to their property if use of the requested access road were denied and requests that BLM's Decision be reversed so the seasonal road closure would be applied to everyone.

[1] Section 501(a)(6) of FLPMA, 43 U.S.C. § 1761(a)(6) (1994), authorizes the Secretary of the Interior to grant rights-of-way over, upon, under, or through public lands for roads, trails, or other means of transportation. See also 43 U.S.C. § 1761(a)(7) (1994). Approval of rights-of-way is a matter of discretion. John M. Stout, 133 IBLA 321, 328 (1995); Coy Brown, 115 IBLA 347, 356 (1990). The Board will ordinarily affirm a BLM decision approving or rejecting a right-of-way application when the record demonstrates that the decision is based on a reasoned analysis of the factors involved, made with due regard for the public interest, and no reason is shown to disturb BLM's decision. James Shaw, 130 IBLA 105, 115 (1994); Coy Brown, *supra*. An appellant, as the party challenging BLM's decision, has the burden of showing adequate reason for appeal and of supporting the allegations with evidence demonstrating error. Conclusory claims of error or differences of opinion, standing alone, do not suffice. Kings Meadow Ranches, 126 IBLA 339, 342 (1993).

As an initial matter, we find that the Council has failed to show any error in BLM's approval of the Beck/Pare and the Kingham segments of the right-of-way. The Beck/Pare right-of-way was originally granted before implementation of the seasonal closure and apparently involves only summer use of the access road. The Kingham right-of-way does not traverse the area subject to the seasonal closure or require use of the culvert in O'Neil Creek. The Council has offered no evidence challenging these conclusions; nor has it shown that alternative access to the Beck/Pare and the Kingham properties exists. We, therefore, affirm BLM's approval of the Beck/Pare and the Kingham segments of amended right-of-way OR-48730.

The Council's appeal and its earlier comments focus on the Schnetzky application. The Bureau acknowledged that the requested access road traversed an area subject to seasonal closure, but also recognized that BLM policy directed it to provide access to private inholdings. See BLM Manual 2800.06.D. Although the Council contends that alternative access to the Schnetzky inholdings exists, BLM thoroughly evaluated that access route and concluded that it was neither safe nor feasible. The Council disagrees with BLM, but has presented no evidence showing that BLM's determination is wrong.

The Council's claims that year-round use of the access road will have devastating consequences on the wildlife wintering in the area ostensibly derive from ODFW's concerns. The record, however, does not support these assertions. In its comments on the EA, ODFW suggested various measures which would reduce impacts to wintering deer to a satisfactory level. The Bureau incorporated these recommendations into its Decision and included them as stipulations in the amended right-of-way grant. Since BLM adopted

all of the protective restrictions proposed by ODFW, the Council's prediction of dire consequences for winter game due to private residential use of the existing access road does not establish error in BLM's Decision.

Similarly, the Council's mere questioning of Schnetzky's ability to adequately improve and maintain the road does not demonstrate that Schnetzky would be unable to perform these tasks. While we recognize the Council's sincere interest in protecting the critical big game winter habitat, its conclusory allegations of error, standing alone without any supporting facts, do not suffice to undermine BLM's Decision.

To the extent not specifically addressed herein, the Council's arguments have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

David L. Hughes
Administrative Judge

I concur:

James L. Burski
Administrative Judge